

PROCEEDS AND INSTRUMENTS OF CRIME ACT, 2014



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An Act to deprive persons convicted of certain crimes of the benefits or rewards gained from such crimes; to deprive persons of property suspected to be a proceed or instrument of crime, to deal with issues such as money laundering, racketeering and other incidental and connected matters.

Date of Assent: 27.08.2014

Date of Commencement: ON NOTICE

ENACTED by the Parliament of Botswana.

Chapter I – *Preliminary*

- Short title and commencement 1. This Act may be cited as the Proceeds and Instruments of Crime Act, 2014 and shall come into operation on such date as the Minister may, by Order published in the *Gazette*, appoint.
- Interpretation 2. (1) In this Act, unless the context otherwise requires —
- “absconder” means a person who has absconded in accordance with subsection (4);
 - “confiscation offence” means any offence under the Laws of Botswana;
 - “exploitation” includes, at a minimum, the exploitation or the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
 - “foreign serious crime related activity” means any act or omission that at the time of its commission, was a foreign offence that, if committed in Botswana, would have been a serious offence, whether or not the person has been charged with the offence, and if charged —
 - (a) has been tried;
 - (b) has been tried and acquitted; or
 - (c) has been convicted;
 - “Fund” means the Confiscated Assets Trust Fund established under section 68;
 - “gift” in relation to property, includes a transfer for a consideration significantly less than the greater of —
 - (a) the prevailing market value of the property; or
 - (b) the consideration paid by the donor.
 - “instrument” means property that —
 - (a) was used, or was intended to be used in, or in connection with, the commission of an offence or serious crime related activity or foreign serious crime related activity; or
 - (b) was derived or realised, or substantially derived or realised, directly or indirectly, from property referred to in paragraph (a);

“interest” in relation to property means —

(a) a legal or equitable estate or interest in the property; or

(b) a right power or privilege over, or in connection with, the property;

“money laundering” means an offence under section 47;

“pattern of racketeering activity” means the planned, ongoing, continuous or repeated participation or involvement in any confiscation offence and includes at least two serious offences, of which one of the offences occurred after the commencement of this Act and the last offence occurred within 10 years, excluding any period of imprisonment, after the commission of such prior serious offence;

“pecuniary penalty order” means an order for the payment of a penalty under Chapter II Part I;

“prescribed investigator” means a police officer, a customs officer or a person authorised to conduct an inquiry or investigation under section 7 of the Corruption and Economic Crime Act or other class of persons as may be prescribed;

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“prescribed person” means any person who is appointed by the Minister by Order to discharge any function or power under this Act;

“proceeds” means property that was derived or realised, or substantially derived or realised, directly or indirectly, by any person from the commission of an offence or a serious crime related activity or foreign serious crime related activity and includes any property with which proceeds have been mixed;

“production order” means an order made under section 51;

“property” means money or any other movable, immovable, corporeal, or unincorporeal thing whether located in Botswana or elsewhere and includes any rights securities and any interest in privileges and claims over that thing as well as:

(a) any currency, whether or not the currency is legal tender in Botswana, and any bill, security, bond, negotiable instrument or any instrument capable of being negotiated which is payable to bearer or endorsed payable to bearer, whether expressed in Botswana currency or otherwise;

(b) any balance held in Botswana currency or in any other currency in accounts with any bank which carries on business in Botswana or elsewhere;

(c) any balance held in Botswana currency or in any other currency in accounts with a bank which carries on business in Botswana;

(d) any balance held in any currency with a bank outside Botswana;

(e) motor vehicles, ships, aircraft, boats, works of art, jewellery, precious metals or any other item of value;

(f) any right or interest in property; and

(g) funds or other assets including all property and any interest, dividends or income on or value accruing or generated by such funds or assets;

“racketeering” means the forming or running of an organisation or group to carry out illegal activities that results in the commission of any offence;

“Receiver” means a person appointed as such under section 46;

“repealed Act” means the Act repealed under section 74;

“restraining order” has the meaning assigned to it under section 35;

“serious offence” means any offence for which the minimum penalty is a fine of P2 000 or imprisonment for a period of 2 years, or to both;

“serious crime related activity” means any act or omission that at the time of its commission, was a serious offence, whether or not the person has been charged with the offence or, if charged —

- (a) has been tried;
- (b) has been tried and acquitted; or
- (c) has been convicted;

“transaction” includes —

- (a) opening an account, issuing a passbook, renting a safe deposit box, entering into a fiduciary relationship or establishing any other business relationship; and
- (b) a proposed transaction; and

“unlawful activity” means any act or omission that constitutes an offence in Botswana or any foreign country that is punishable by imprisonment.

(2) For the purposes of this Act, a person is convicted of an offence where —

- (a) the person has been charged with an offence and the court hearing the charge finds the person guilty of the offence but does not record a conviction;
- (b) the offence was, with the consent of the person, taken into consideration by the court in passing sentence; or
- (c) the person has been charged with the offence but, before the commencement of the trial, the person absconds.

(3) For the purposes of an application under this Act in relation to a confiscation offence, a serious crime related activity or a foreign serious crime related activity, property in which a person has an interest includes —

- (a) any property that is, on the day when the first application is made under this Act in respect of that offence or activity, subject to the effective control of the person; and
- (b) any property that was the subject of a gift from the person to another person within the period of 6 years before the first application was made under this Act in respect of that offence or activity.

(4) For the purposes of this Act, a person is deemed to abscond if —

- (a) the person is charged with an offence but dies without the charge having been determined; or
- (b) the person is charged with an offence, a warrant to arrest the person is issued in relation to that charge and one of the following occurs —

- (i) the person dies without the warrant being executed,
 - (ii) at the end of the period of 6 months commencing on the day on which the warrant is issued —
 - (A) the person cannot be found;
 - (B) the person is, for any other reason, not amenable to justice and, if the person is outside Botswana, extradition proceedings have not commenced,
 - (C) the person is, by reason of being outside Botswana, not amenable to justice; or
 - (D) extradition proceedings have commenced but terminate without an order for extradition;
 - (c) the person was committed for trial for the offence; or
 - (d) a court makes an order that the evidence is of sufficient weight to support a conviction for the offence.
- (5) For the purposes of this Act, property is deemed to be subject to the effective control of a person whether or not the person has an interest in it and in determining whether or not property is subject to the effective control of a person or whether or not there are reasonable grounds to believe that it is, regard may be had to —
- (a) shareholdings in, debentures over or directorships of a company that has an interest, whether direct or indirect, in the property;
 - (b) a trust that has a relationship to the property; and
 - (c) family, domestic, business or other relationships between persons having an interest in the property, or in companies of the kind referred to in paragraph (a) or trusts of the kind referred to in paragraph (b), and other persons.

Chapter II — *Confiscation*

Part I — *Pecuniary Penalty Orders*

3. (1) Where a person (in this Part referred to as the respondent) has been convicted of one or more serious or confiscation offences, the Director of Public Prosecutions may apply to the court before which the conviction was obtained or to the High Court for a pecuniary penalty order against that person.

Application
for pecuniary
penalty order

(2) Except with the leave of the court, an application under subsection (1) shall be made within 12 months of the date of the conviction for the offence in respect of which it is made.

(3) A court shall not grant leave under subsection (2) unless it is satisfied that —

- (a) the benefit to which the application relates was only derived, realised or identified after the end of the 12 month period referred to in subsection (2);
- (b) the necessary evidence only became available after the end of the 12 month period referred to in subsection (2); or
- (c) it is otherwise in the interests of justice to do so.

(4) The Director of Public Prosecutions shall give written notice of an application made under subsection (1) to the respondent unless the court waives this requirement upon being satisfied that it is reasonable to do so.

(5) An application made under subsection (1) may be amended at any time prior to its final determination where reasonable notice of the amendment is given by the applicant.

(6) Subject to subsection (7), after an application made under this section has been finally determined, no further application may be made under this Part against the respondent in respect of the same confiscation offence without the leave of the court which determined the application or the leave of the High Court.

(7) The leave of the High Court referred to under subsection (6) shall not be given unless the court is satisfied that —

(a) the benefit to which the new application relates was only derived, realised or identified after the determination of the first application;

(b) the necessary evidence only became available after the determination of the first application; or

(c) it is otherwise in the interests of justice to do so.

Determination
of application
for pecuniary
penalty order

4. (1) Subject to subsection (4), the court shall in determining an application made under section 3, assess the value of the benefits derived from the commission of the offence in accordance with Part III and —

(a) where the offence is a confiscation offence, the court may order that the respondent pay to the Government a penalty equal to the value of the benefit as assessed; or

(b) where the offence is a serious offence, the court shall order that the respondent pay to the Government a penalty equal to the value of the benefit as assessed:

Provided that where an amount has been paid or is payable by way of restitution or compensation the penalty may be reduced by that amount if the court considers it appropriate to do so.

(2) A respondent is entitled to appear and to adduce evidence at the hearing of an application made under section 3 unless such a respondent is an absconder.

(3) Notwithstanding subsection (2) the non-appearance of the respondent at the hearing shall not prevent the court from making a final determination in the matter.

(4) The court may in determining an application under section 3, subject to any rules of court, take into account any material that it thinks fit including —

(a) any statement or disclosure made in an examination ordered under Chapter VI; and

(b) evidence given in any proceedings relating to the offence of which the respondent was convicted and which gave rise to the application.

(5) For purposes of this section, the whole or any part of the transcript of proceedings referred to in subsection (4) shall be admissible in evidence as if it is a record of evidence given on the hearing of the application.

(6) A court may make a pecuniary penalty order under this Part by consent of the applicant and the respondent.

5. The making of a pecuniary penalty order under this Part does not prevent the making of a forfeiture order under Chapter II Part IV or the occurrence of automatic forfeiture in respect of an interest in property of the defendant in relation to the same offence.

Forfeiture order and pecuniary penalty order

6. The amount a respondent is required to pay under a pecuniary penalty order is a civil debt payable by the respondent to the Government and is recoverable as such.

Pecuniary penalty orders recoverable as civil debt

7. A pecuniary penalty order made under this Part is discharged —

Discharge of pecuniary penalty order

(a) if the conviction in reliance of which the order is made is subsequently quashed;

(b) if —

(i) in reliance on a deemed conviction of a person a pecuniary penalty order has been made under this Part against the person and the person is acquitted, or

(ii) after the making of the order, the person surrenders to a member of the Botswana Police Service or an officer of the Directorate on Corruption and Economic Crime or is found or becomes for any other reason amenable to justice and the person is tried and acquitted;

(c) if it is discharged by a court which hears an appeal against it; or

(d) if the amount set out in the penalty order is paid.

8. (1) If —

Variation of pecuniary penalty order

(a) a court made a pecuniary penalty order under this Part in relation to an offence;

(b) in assessing the value of the benefits derived from the offence, the court took into account the making of a restitution or compensation order under the Criminal Procedure and Evidence Act against the defendant in relation to the offence; and

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(c) an appeal against the restitution or compensation order is allowed, the Director of Public Prosecutions or the respondent may apply to the court which made the pecuniary penalty order for a variation of that order, taking into account the successful appeal.

(2) An applicant under subsection (1) shall give written notice of the application to the Director of Public Prosecutions or the respondent, as the case may be.

(3) On an application under subsection (1) the court may, if it considers it appropriate to do so, vary the pecuniary penalty order.

9. (1) On application by the Director of Public Prosecutions, a prescribed person or a person belonging to a prescribed class of persons, a court may, if in its opinion particular property in respect of which a restraining order has been made —

Availability of property to satisfy order

- (a) was, on the date when the order was made, subject to the effective control of the defendant; or
 - (b) was the subject of a gift from the defendant to another person — make an order declaring that the whole, or a specified part, of that property is available to satisfy a pecuniary penalty order.
- (2) If a court declares that property is available to satisfy a pecuniary penalty order, the order may be enforced as if the property is the property of the defendant.
- (3) An applicant under subsection (1) shall give written notice of the application —
- (a) to the person against whom the order is sought;
 - (b) to the defendant;
 - (c) to any other person to whom the court directs that notice be given; and
 - (d) to any other person whom the applicant has reason to believe has an interest in the property.
- (4) Any person notified under subsection (3) or any other person who claims an interest in the property may seek leave to appear and to give evidence at the hearing of the application but the absence of a person does not prevent the court from making an order under this section.
- (5) In deciding whether to give leave under subsection (4), the court may have regard to the following —
- (a) whether the respondent has been given notice of any restraining order affecting property the subject of an application under subsection (1);
 - (b) the findings or any evidence given in an application for the exclusion from restraint of property the subject of an application under subsection (1); or
 - (c) any other relevant matter.
- 10.** A court has power to give directions that are necessary to give effect to a pecuniary penalty order made by it and may, if it is satisfied on reasonable grounds that any directions have not been, or would not be, complied with, make an order directing a person specified in the order to take control of property on which there is a charge created by section 28.

Court may give directions

Part II — *Civil Penalty Orders*

Application for a civil penalty order

11. (1) The Director of Public Prosecutions or a prescribed person may apply to a magistrate’s court or to the High Court for a civil penalty order requiring a person (in this Part referred to as “the respondent”) to pay to the Government an amount assessed by the court as the value of the benefits derived by the respondent from a serious crime related activity that took place not more than twenty years before the making of the application.

(2) The Director of Public Prosecutions or the prescribed person shall give written notice of an application made under subsection (1) to the respondent.

(3) An application under subsection (1) may be amended at any time prior to its final determination provided that reasonable notice of the amendment is given to the respondent.

(4) After an application under subsection (1) has been finally determined, no further application may be made under this Part against the respondent in respect of the same serious crime related activity without the leave of the High Court.

(5) The leave of the High Court referred to under subsection (4) shall not be given unless the court is satisfied that —

- (a) the benefit to which the new application relates was only derived, realised or identified after the determination of the first application;
- (b) the necessary evidence only became available after the determination of the first application; or
- (c) it is otherwise in the interests of justice to do so.

12. (1) Subject to subsection (3), the court shall, upon hearing an application made under section 11, if it finds it to be more probable than not that the respondent was at any time engaged in a serious crime related activity —

- (a) assess the value of the benefits derived from the serious crime related activity in accordance with Part III and order that the respondent pay to the Government a penalty equal to the value of the benefit as assessed; or
- (b) order that the respondent pay less if the court thinks it appropriate to take into account any amount paid or payable by way of restitution or compensation in relation to the same offence.

(2) A finding of the court for the purposes of subsection (1) need not be based on a finding as to the commission of a particular offence and can be based on a finding that some offence or other constituting a serious crime related activity was committed.

(3) The respondent is entitled to appear and to adduce evidence at the hearing of an application made under section 11 (1) unless such a respondent is an absconder or is otherwise not amenable to justice.

(4) Notwithstanding subsection (3), the non-appearance of the respondent at the hearing shall not prevent the court from making a final determination in the matter.

(5) A court may make a civil penalty order under this Part by consent of the applicant and the respondent.

13. The twenty years period referred to in section 1 may extend back prior to the commencement of this Act.

14. The quashing or setting aside of a conviction for an offence that corresponds to a serious crime related activity upon which an application under this Part is founded does not affect the validity of a civil penalty order.

Determination
of application
for civil
penalty order

Extension
of period

Effect of
civil penalty
order

Civil orders
recoverable
as debt

15. (1) The amount a person is required to pay under a civil penalty order is a civil debt payable by the person to the Government and is recoverable as such.

(2) An application for a civil penalty order under this Part may be made whether or not an application has been made for another form of confiscation under Chapter II or III.

Part III – *Assessment of Penalties*

Methods of
assessment

16. (1) For the purposes of this Part, the value of the benefits derived by a respondent in relation to a confiscation offence or to serious crime related activity may include –

- (a) any money received as a result of the commission of the offence or the serious crime related activity;
- (b) any property that was derived or realised, directly or indirectly, by the respondent or another person, at the request or by the direction of the defendant, as the result of the commission of the offence or the serious crime related activity;
- (c) any benefit, service or financial advantage provided for the respondent or another person, at the request or by the direction of the respondent, as the result of the commission of the offence or the serious crime related activity;
- (d) any increase in the total value of property in which the respondent has an interest in the period beginning immediately before the commission of the offence or the serious crime related activity and ending at some time after the commission of the offence or the serious crime related activity that the court is not satisfied was due to causes unrelated to the commission of the offence or the serious crime related activity;
- (e) subject to subsection (3), any profits derived by the respondent, or by another person on the respondent's behalf or at the request or by the direction of the respondent, from a depiction of the offence or serious crime related activity or an expression of the respondent's thoughts, opinions or emotions regarding the offence or serious crime related activity in –
 - (i) a film, slide, video tape, video disc or any other form of recording from which a visual image can be produced,
 - (ii) a record, tape, compact disc or any other form of recording from which words or sounds can be produced,
 - (iii) a book, newspaper, magazine or other written or pictorial matter,
 - (iv) a radio or television production, or
 - (v) a live entertainment of any kind; or
- (f) any other thing that the court thinks fit to treat as benefits which benefits shall not include any property forfeited to the Government under this Act.

(2) For the purposes of subsection (1) (d), if an offence or serious crime related activity is committed between two dates, the period begins immediately before the earlier of the two dates and ends at some time after the later of the two dates.

(3) In the determination of whether to treat profits of a kind referred to in subsection (1) (e) as benefits derived in relation to the offence or serious crime related activity, the court may have regard to any matters that it thinks fit including —

- (a) whether it is in the public interest to treat them as benefits;
- (b) whether the depiction or expression has any general social or educational value; and
- (c) the nature and purposes of the publication, production or entertainment including its use for research, educational or rehabilitation purposes.

(4) For the purpose of assessing the value of any benefit in accordance with subsection (1) the court shall disregard any expenditure that may have been incurred in deriving that benefit.

17. (1) Where an application is made for a penalty order under Part I or Part II of this Chapter, the Director of Public Prosecutions or a prescribed person may apply to a court before which the determination of a penalty order is made or to the High Court for the application of this section in relation to the assessment of benefits derived from a serious offence or a serious crime related activity.

Assessment
of benefits
of serious
offences and
serious crime
related
activities

(2) Where an application is made under subsection (1) and the court is satisfied that —

- (a) one or more of the offences in respect of which the application for a penalty order is made is a serious offence; or
- (b) the conduct forming the basis of the application amounts to a serious crime related activity,

the court shall assess the benefits derived in accordance with this section.

(3) In assessing the value of the benefits derived by a respondent in relation to a serious offence or a serious crime related activity, the court shall, subject to subsection (4), treat as benefits —

- (a) all property in which the defendant had an interest at the time the first application is made under this Act; and
- (b) all expenditure of the defendant within the period of six years immediately before the time the first application is made under this Act, regardless of whether any benefits were actually derived and whether they were derived in relation to an offence or serious crime related activity, but such benefits shall not include any property which has been forfeited to the Government under this Act.

(4) On an application under subsection (1), the court may refuse to treat as benefits any specified property or expenditure where it is satisfied by the respondent that —

- (a) in the case of property, the property —
 - (i) was lawfully acquired by the respondent, and
 - (ii) was not used in or is in any way connected with any unlawful activity and was not derived or realised, directly or indirectly, by any person from any unlawful activity; or
- (b) in the case of expenditure, the funds which were expended were lawfully acquired and were not derived or realised, directly or indirectly, by any person from any unlawful activity.

Part IV — *Forfeiture Orders*

Application
for forfeiture
order

18. (1) Where a person has been convicted of one or more confiscation offences, the Director of Public Prosecutions may apply to the court before which the conviction was obtained or to the High Court for a forfeiture order against proceeds or instruments relating to that offence or offences.

(2) Except with the leave of the court, an application under subsection (1) shall be made within 12 months of the date of the conviction for the offence in respect of which it is made.

(3) A court may not grant leave under subsection (2) unless it is satisfied that —

- (a) the proceeds or instruments to which the application relates were only identified after the end of the 12 month period referred to in subsection (2);
- (b) the necessary evidence only became available after the end of the 12 month period referred to on subsection (2); or
- (c) it is otherwise in the interests of justice to do so.

(4) The applicant shall give written notice of an application made under subsection (1) to any person the applicant has reason to believe has an interest in property the subject of the application unless they have absconded or the court waives this requirement upon being satisfied that it is fair to do so.

(5) An application made under subsection (1) may be amended at any time prior to its final determination where reasonable notice of the amendment is given by the applicant.

(6) Subject to subsection (7), after an application made under this section has been finally determined, no further application may be made under this Part against the defendant in respect of the same confiscation offence without the leave of the court which determined the application or the High Court.

(7) The leave of the High Court referred to under subsection (6) shall not be given unless the court is satisfied that —

- (a) the proceeds or instruments to which the new application relates were only identified after the determination of the first application;
- (b) the necessary evidence only became available after the determination of the first application; or
- (c) it is otherwise in the interests of justice to do so.

Determination
of application

19. (1) If, on an application under section 18 the court is satisfied that the property is proceeds or an instrument, the court may order that the property, or a part of the property as is specified by the court in the order, be forfeited to the Government.

(2) A forfeiture order shall specify the interests in property to which it applies.

(3) If an application is made under section 18 to the court before which the person was convicted of the offence before that court has passed sentence for the offence, that court may make a forfeiture order at the time of passing sentence and for this purpose the court may, if it thinks it necessary to do so, defer the passing of sentence until it has determined the application for the order.

(4) The court may in determining an application under section 18, subject to any rules of court, take into account any material that it thinks fit including —

- (a) any statement or disclosure made in an examination ordered under Chapter VI; and
- (b) evidence given in any proceedings relating to the offence of which the respondent was convicted and which gave rise to the application.

(5) For purposes of this section, the whole or any part of the transcript of proceedings referred to in subsection (4) shall be admissible in evidence as if it is a record of evidence given on the hearing of the application.

(6) In considering whether to make an order under subsection (1) in respect of particular property, the court may have regard to —

- (a) the use that is ordinarily made, or had been intended to be made, of the property;
- (b) any hardship that is likely to be caused to any person by the order; and
- (c) the claim of any person to an interest in the property having regard to the matters specified in section 44.

(7) The making of a forfeiture order does not prevent the making of a pecuniary penalty order.

(8) A court may make a forfeiture order under this Part in respect of an interest in property by consent of the applicant and of any person whom it has reason to believe holds that interest in property.

20. (1) Where a person has been convicted of a confiscation offence the Director of Public Prosecutions may apply to the court before which the person was convicted for the confiscation offence or to the High Court for an instrument substitution declaration.

Application
for an
instrument
substitution
declaration

(2) An application under subsection (1) shall —

- (a) specify the property that the person used or intended to use in or in connection with the commission of the confiscation offence of which the person was convicted; and
- (b) specify property which is to be substituted for the property referred to in paragraph (a) that —
 - (i) is property in which the person had an interest at the time that the confiscation offence was committed; and
 - (ii) is of the same general nature or description as the property referred to in paragraph (a).

Instrument
substitution
declaration

21. (1) Subject to subsection (2), a court may make an instrument substitution declaration if the court is satisfied as to the following matters —

- (a) that the person convicted of the confiscation offence used or intended to use the property referred to in section 20 (2) (a) in or in connection with the commission of the confiscation offence for which the person was convicted;
- (b) that it is not appropriate to make a forfeiture order in respect of the property referred to in section 20 (2) (a) because the person who was convicted of the confiscation offence has no interest in that property; and
- (c) that the property which is to be substituted for the property referred to in section 20 (2) (a) —
 - (i) is property in which the person had an interest at the time that the confiscation offence was committed; and
 - (ii) is of the same general nature or description as the property referred to in section 20 (2) (a).

(2) The court may make an instrument substitution declaration whether or not the value of the property referred to in section 20 (2) (a) is equal to the value of the property which is to be substituted for that property.

(3) A court shall not make an instrument substitution declaration in respect of any property if, at the time of the commission of the confiscation offence, the person convicted of the confiscation offence did not have an interest in the property.

(4) If the court makes an instrument substitution declaration in respect of property under this section, that property —

- (a) is substituted for the property which is not available for forfeiture; and
- (b) is deemed to be an instrument and is forfeited to the Government.

Part V — *Automatic Forfeiture*

Automatic
forfeiture
upon
conviction

22. (1) Restrained property, subject to any declaration under section 45 (1), shall be forfeited to the Government on the expiry of 60 days if —

- (a) a person, in this Part referred to as “the defendant”, is convicted of a serious offence;
- (b) a restraining order is or was made under Chapter IV in respect of property for the purposes of automatic forfeiture in reliance of —
 - (i) the defendant’s conviction of that offence, or
 - (ii) the investigation, charging or proposed charging of the defendant with that offence or a related offence that is a serious offence; and
- (c) the restrained property is not the subject of an exclusion order under section 44.

(2) The 60 day period referred to under subsection (1) shall be counted from —

- (a) the making of the restraining order; or
- (b) the defendant's conviction —

whichever is later.

(3) If, within the period of 60 days referred to in subsection (1), an application has been made for an exclusion order under section 44 in respect of restrained property, the property shall be forfeited to the Government —

- (a) if the application is refused or dismissed, at the end of the period during which the person may appeal against the refusal or dismissal or, if such an appeal is lodged, when the appeal is abandoned or finally determined without the order having been made or a new hearing ordered; or
- (b) if the application is withdrawn or struck out, on that withdrawal or striking out.

(4) If a person, by reason of section 2 (2), is deemed to have been convicted of a serious offence, the Director of Public Prosecutions may apply to the High Court for an order declaring the date of conviction for the purposes of this section.

(5) On an application under subsection (4), the court shall not make an order declaring the date of conviction of a person of a serious offence unless it is satisfied that the person is not amenable to justice.

23. (1) The Director of Public Prosecutions may apply to the court which convicted a defendant of an offence for a declaration that the offence was a serious offence.

Application
for declaration

(2) The applicant shall give written notice of an application under subsection (1) to the defendant.

(3) The court hearing the application under subsection (1) may waive the requirement to give notice if the defendant is present before the court.

(4) The defendant is entitled to appear and to give evidence at the hearing of the application under subsection (1) but the absence of the defendant does not prevent the court from making a declaration.

(5) On an application under subsection (1), the court may make a declaration if satisfied that the offence is a serious offence.

24. (1) If a court makes a restraining order in reliance of —

- (a) a defendant's conviction of a serious offence; or
- (b) the charging or proposed charging of a defendant with a serious offence, a person may apply to the court that made that order for a declaration that property that was subject to the restraining order has been forfeited to the Government under section 22 and the court, if satisfied that the property has been forfeited to the Government under that section, shall make a declaration accordingly.

Declaration
on forfeited
property

(2) An applicant under this section for a declaration that property has been forfeited is not required to give notice of the application to any person who has an interest in the property.

Part VI — *Civil Forfeiture*

Civil forfeiture
order

25. An order for civil forfeiture shall be an order *in rem*, granted by a magistrate's court or the High Court to forfeit to the Government, property that is proceed or an instrument of a serious crime related activity or foreign serious crime related activity.

Application
for a civil
forfeiture order

26. (1) The Director of Public Prosecutions or a prescribed person may apply to a magistrate's court or to the High Court for a civil forfeiture order over property that is a proceed or an instrument of a serious crime related activity or foreign serious crime related activity.

(2) An application under subsection (1) shall be made within 12 years of the date upon which the serious crime related activity or foreign serious crime related activity was carried out.

(3) An application made under subsection (1) may be amended at any time prior to its final determination where reasonable notice of the amendment is given by the applicant.

Grant of civil
forfeiture order

27. (1) Subject to subsection (5), a magistrate's court or the High Court may grant a civil forfeiture order in respect of property or a part of the property as is specified in the order, where, it is satisfied on the balance of probabilities that that property is a proceed or an instrument of —

- (a) a serious crime related activity; or
- (b) a foreign serious crime related activity.

(2) An order made under subsection (1) (a) may be made in respect of property located anywhere in the world.

(3) An order made under subsection (1) (b) may only be made in respect of property located within Botswana.

(4) For purposes of subsection (1), it shall be sufficient for the court to be satisfied that —

- (a) the property is a proceed derived directly or indirectly, in whole or in part, from some form of serious crime related activity or foreign serious crime related activity rather than a proceed derived directly or indirectly, in whole or in part, from a particular criminal offence; or

- (b) the property is an instrument used or intended to be used in connection with some form of serious crime related activity or foreign serious crime related activity rather than to commit a specific criminal offence.

(5) For the purposes of making a determination under subsection (1), proof that a person was convicted, found guilty; or found not criminally responsible in relation to a similar offence arising from the same facts as the alleged serious crime related activity or foreign serious crime related activity is proof that the person committed the serious crime related activity or foreign serious crime related activity.

Part VII — *General Provisions***28.** Where —

- (a) an order for the payment of a penalty is made under Part I or II ; or
- (b) a restraining order is in force for the purpose of securing the payment of the penalty,

then by virtue of this section, and unless a magistrate's court or the High Court otherwise directs, a charge shall be created on all property which is the subject of the restraining order to secure payment to the Government of the amount of the penalty order.

Charge on property

29. (1) Subject to subsection (2), where a forfeiture order is made under Part IV or VI or where automatic forfeiture of property occurs under Part V, property the subject of the order or subject to the operation of Part V vests absolutely in the Government by virtue of the order or the operation of the Act, as the case may be.

Vesting of forfeited property

(2) Where the property is property the title to which is passed by registration in accordance with the Deeds Registry Act, the property vests in the Government in equity by virtue of the order and vests at law when the applicable registration requirements have been met.

(Cap. 33:02)

(3) The Government shall be the owner of the registered property referred to in subsection (2) and the Director of Public Prosecutions or the Receiver shall do anything necessary or convenient to secure such registration including executing instruments for transferring an interest in the property.

(4) Where property is forfeited under this Chapter the property shall not, unless with the leave of the court, be disposed of, or otherwise dealt with before the expiration of any appeal period relating to the forfeiture or if an appeal is made before the appeal is finally determined.

Chapter III — *Administrative Forfeiture***30.** (1) A prescribed investigator may seize —

- (a) currency or bearer negotiable instruments;
- (b) precious or semi-precious stones; or
- (c) other classes of property considered appropriate for administrative forfeiture as may be prescribed, if there are reasonable grounds for suspecting that the property is a proceed or an instrument of a confiscation offence or of a foreign serious crime related activity.

Forfeiture of currency, bearer negotiable instruments, etc.

(2) As soon as practicable after the seizure of any property under subsection (1) the prescribed investigator shall serve a copy of a seizure notice using such form as may be prescribed upon —

- (a) the person from whom the property was seized; and
- (b) any other person located within Botswana who the prescribed investigator believes has an interest in the property.

(3) For purposes of this Part, any cash which is the subject of a false import declaration under the Customs and Excise Act shall be deemed to be an instrument.

(Cap. 50:01)

Forfeiture of seized property to Government

31. (1) Property seized under section 30 is forfeited to the Government if no claim for the return of the property is made within 28 days of service of the notice referred to in section 30 (2).

(2) A claim referred to in subsection (1) —

- (a) may be made by any person claiming an interest in the seized property (referred to hereafter as the claimant);
- (b) shall be made using the form and procedures prescribed in the regulations; and
- (c) shall be served upon the prescribed investigator who seized the property which is the subject of the application.

Application for determination of claim

32. (1) Where a claim is made under section 31, the claimant shall, within 60 days of the date of service of the claim upon the investigator, file an application for determination of the claim in accordance with this section in the magistrates' court.

(2) Where a claimant —

- (a) fails to file an application for determination of the claim within the period prescribed under subsection (1); or
- (b) files an application for determination of the claim within the period prescribed under subsection (1) but subsequently withdraws the application or the application is for any other reason set aside or struck out,

all property that is the subject of a claim under section 31 is forfeited to the Government.

(3) An application for determination of a claim under subsection (1) shall be served upon the Director of Public Prosecutions and shall be dealt with in accordance with this Act.

Determination of claim

33. (1) The court, when making a determination of a claim under section 32 shall, having regard to the evidence before it, consider whether —

- (a) the property which is the subject of the application is a proceed or an instrument of a confiscation offence or a foreign serious crime related activity;
- (b) the property is a proceed or an instrument of some offence or activity falling within the general description of a confiscation offence or foreign serious crime related activity.

(2) If the court is satisfied on the balance of probabilities that property which is the subject of the application is a proceed or an instrument of a confiscation offence, or of an activity falling within the general description of a confiscation offence or is a proceed or instrument of a foreign serious crime related activity or some activity falling within the general description of a foreign serious crime related activity it shall order that the property be forfeited to the Government.

(3) If the court is not satisfied that property falls within the requirements of subsection (2) it shall direct that the property be returned to its owner or the claimant.

(4) Where an application is made for a determination of a claim relating to property seized on the basis that it is an instrument or a proceed of a foreign crime related activity, the hearing of the claim may be adjourned on the application of the Director of Public Prosecutions for a period of up to six months to permit investigations to be conducted in the jurisdiction where the foreign crime has been committed.

(5) The powers granted to the court under this section do not derogate from any other power or discretion of the court relating to the adjournment of proceedings before it.

(6) Where an application for the determination of a claim made under subsection (1) is dismissed, withdrawn or struck out, the property which is the subject of the claim shall be forfeited to the Government.

34. Proceedings commenced under this Part do not affect Chapters II and IV to the extent that they might operate against property that has been seized under this Chapter.

Effect of
administrative
forfeiture

Chapter IV — *Restraint of Property Subject to Confiscation under Chapter II*

35. (1) For the purposes of this Act, a restraining order is an order that property or any interest in property shall not be disposed of or otherwise dealt with except in the manner or circumstances, if any, specified in the order.

Restraining
orders

(2) An application for a restraining order in respect of any property in which a person has an interest may be made to a magistrate's court or the High Court by the Director of Public Prosecutions and, in the case of applications to restrain property for the purposes of Chapter II Parts II or VI, an application may be made to restrain a person's property in respect of —

- (a) specified property of the person;
- (b) all the property of the person, including property acquired after the making of the order;
- (c) specified property of the person and all other property of the person, including property acquired after the making of the order;
- (d) all the property of the person, including property acquired after the making of the order, other than specified property; or
- (e) specified property of another person.

(3) The court may grant a restraining order subject to any conditions it thinks fit, and an order may direct the Receiver to take control of some or all of the property specified in the order.

(4) Where a restraining order has been granted over any person's property the court may authorise the payment of —

- (a) reasonable living expenses, including the reasonable living expenses of any dependants of the person against whom a restraining order has been granted;
- (b) reasonable legal expenses in respect of any proceedings under the Act or any related criminal proceedings; and
- (c) reasonable business expenses of the person against whom a restraining order has been granted.

(5) A court shall not make provision of a kind referred to in subsection (4) unless it is satisfied that the person cannot meet the expense concerned out of property that is not subject to a restraining order.

Purpose for
restraining
order

36. (1) An application for a restraining order shall state the purpose for which it is sought.

(2) An application for a restraining order shall set out the purpose for which the property is sought to be restrained and state whether it is to satisfy —

- (a) any pecuniary penalty order made under Part I of Chapter II;
- (b) any civil penalty order made under Part II of Chapter II;
- (c) any forfeiture order made under Part IV of Chapter II;
- (d) automatic forfeiture of property under Part V of Chapter II; or
- (e) any civil forfeiture made under Part VI of Chapter II.

(3) Where the court grants a restraining order over property or in respect of any interest in property it shall state, in the restraining order, the purpose for which the property or interest is restrained.

Application
for restraining
order to secure
property for
purposes of
Chapter II
Part I and IV

37. (1) In order to secure property for a penalty order under Part I of Chapter II or a forfeiture order under Part IV of Chapter II the Director of Public Prosecutions may apply to the court for a restraining order in respect of property, in which a person who has been convicted of a confiscation offence, or has been charged with or is the subject of an investigation for such an offence has an interest, or property which is a proceed or an instrument in relation to that offence.

(2) An application under subsection (1) shall be supported by an affidavit of a prescribed investigator setting out any relevant matters and in particular that the prescribed investigator reasonably believes the following and setting out the grounds upon which those beliefs are held —

- (a) that the person has either been convicted, charged with, or is the subject of an investigation for a confiscation offence;
- (b) that the person has committed a confiscation offence;
- (c) in the case of an application to secure property for the purpose of a forfeiture order, that the property the subject of the application is —

(i) the proceeds of, or an instrument of the confiscation offence; or

(ii) the property of the person that is of the same nature or general description as an instrument of the confiscation offence and which is to be the subject of an application pursuant to section 20; or

(d) in the case of an application to secure property for the purpose of a pecuniary penalty order, that the person —

- (i) derived a benefit from the confiscation offence, and
- (ii) has an interest in the property which is the subject of the application.

38. (1) In order to secure property for automatic forfeiture under Part V of Chapter II the Director of Public Prosecutions may apply for a restraining order in respect of property in which a person, who has been convicted of a serious offence or has been charged with or is the subject of an investigation for such an offence, has an interest.

Application
for
restraining
order to secure
property
Chapter II
Part V

(2) An application under subsection (1) shall be supported by an affidavit of a prescribed investigator setting out any relevant matters and in particular that the prescribed investigator reasonably believes the following and setting out the grounds upon which those beliefs are held —

- (a) that the subject person has either been convicted, charged with, or is the subject of an investigation for a serious offence;
- (b) that the person committed a serious offence; and
- (c) that the person has an interest in the property which is the subject of the application.

39. (1) In order to secure property for a civil penalty order under Part II of Chapter II or a civil forfeiture order under Part VI of Chapter II the Director of Public Prosecutions or a prescribed person may apply to the High Court for a restraining order in respect of property where —

Application
for
restraining
order to secure
property
Chapter II
Part II
and Part VI

- (a) an application for a civil penalty order has been or is about to be made against a person who has derived a benefit from a serious crime related activity or a foreign serious crime related activity; or
- (b) an application for a civil forfeiture order has been or is about to be made against that property.

(2) An application under subsection (1) (a) or (b) shall be supported by an affidavit of a prescribed investigator setting out any relevant matters and in particular that the prescribed investigator reasonably believes the following and setting out the grounds on which those beliefs are held —

- (a) that, where an application for a civil penalty order or a civil forfeiture order has not been made, such an application will be made within 28 days;
- (b) that, in the case of an application for a civil forfeiture order, the property which is the subject of the application is either a proceed or an instrument of a serious crime related activity or a foreign serious crime related activity;
- (c) that, in the case of an application for a civil penalty order, the person whom the order is made against, has an interest in the property which is the subject of the application; or
- (d) that, in the case of an application for a civil penalty order, the person whom the order is made against, derived a benefit from a serious crime related activity or a foreign serious crime related activity.

(4) An application under subsection (1) in respect of proceeds or instruments of a foreign serious crime related activity or benefits derived from a foreign serious crime related activity may only be made if the property which is the subject of the application is located within Botswana.

Procedure on application

40. (1) A court may require an applicant for a restraining order under sections 37 to 39 to give notice of the application to any person whom it has reason to believe has an interest in the property which is the subject of the application.

(2) A direction by the court under subsection (1) may only be made if the court is satisfied that —

- (a) the interests of justice require that notice be given; and
- (b) the giving of notice will not result in the risk of loss or dissipation of the property which is the subject of the application for the restraining order.

(3) A person notified under subsection (1) is entitled to appear and give evidence at the hearing of the application, but the absence of that person shall not prevent the court from issuing a restraining order.

(4) The court may —

- (a) order that the whole or any part of the proceedings be heard in camera;
- (b) order that only persons or classes of persons that it specifies, be present during the whole or any part of the proceedings; or
- (c) make an order prohibiting the publication of a report of the whole or any part of the proceedings or of any information derived from the proceedings.

(5) The court shall cause a copy of any order made under subsection (4) to be posted in a conspicuous place where notices are usually posted at the court.

(6) Any person who contravenes an order of the court under subsection (4) commits an offence and is liable to a fine not exceeding P20 000.00 or imprisonment for 12 months, or to both.

(7) Where the Director of Public Prosecutions applies to a court for a restraining order under sections 37 to 39, a witness shall not be required to answer a question or to produce a document if the court is satisfied that the answering of the question or the production of the document may prejudice the investigation of, or the prosecution of a person for an offence.

Determination of application

41. The court may make a restraining order in respect of the property in question to secure any of the orders specified under sections 37, 38 or 39 where it is satisfied that any of the matters set out in the applications under those sections have been complied with.

Notice of restraining order to be given persons affected

42. (1) If a restraining order is made in respect of property to a person and notice had not been given to that person of the application for the order, the applicant shall give written notice of the making of the order to that person as soon as practicable.

(2) If a person to whom notice is to be given under subsection (1) cannot be found after all reasonable steps have been taken to locate the person, the applicant shall cause to be published in a newspaper circulating generally in Botswana, a notice containing details of the restraining order or give notice to that person in any other manner that the court directs.

43. (1) The court may, when it makes a restraining order or at any later time, make such orders in relation to the property to which the restraining order relates as it considers just.

(2) An order under subsection (1) may be made on the application of —

- (a) the applicant for the restraining order;
- (b) any person to whose property the restraining order relates or who has an interest in that property;
- (c) a Receiver, if the restraining order directed the Receiver to take control of the property; or
- (d) any other person who obtains the leave of the court to apply.

(3) Unless the application is made at the same time as an *ex parte* application for a restraining order, any person referred to in subsection (2) is entitled to appear and to give evidence at the hearing of an application under this section but the absence of that person does not prevent the court from making an order.

(4) The applicant for an order under subsection (1) shall, unless the application is made at the same time as an *ex parte* application for a restraining order, give written notice of the application to each person referred to in subsection (2) who have a right to apply for an order under this section.

(5) Orders that the court may make under subsection (1) include —

- (a) an order varying the property to which the restraining order relates;
- (b) an order varying any condition to which the restraining order is subject;
- (c) subject to section 35 (5), an order providing for the reasonable living expenses, legal expenses and reasonable business expenses of any person referred to in section 35 (4);
- (d) an order for examination under Chapter VI;
- (e) an order directing any person whose property the restraining order relates to or any other person to furnish to such person as the court directs, within the period specified in the order, a statement, verified by the oath or affirmation of that person, setting out such particulars of the property to which the restraining order relates as the court thinks proper;
- (f) an order directing any relevant registration authority not to register any instrument affecting property to which the restraining order relates while it is in force except in accordance with the order;
- (g) an order directing the Receiver to take control of property at any later time specified in the order under subsection (1);
- (h) an order regulating the manner in which the Receiver may exercise powers or perform duties under the restraining order;
- (i) an order determining any question relating to the property; or
- (j) an order directing a person to whose property the restraining order relates or who has an interest in that property to use or manage specified property to which the restraining order relates, subject to conditions specified in the order.

Exclusion of
property
from restraint

44. (1) Where the court, in reliance of the existence of a conviction, charge or investigation makes a restraining order against property, a person who has been convicted of, or has been charged with a confiscation offence or is the subject of an investigation for a confiscation offence or who has, or is about to have an application made against them for a civil forfeiture order or civil penalty order (in this section referred to as the “relevant person”) or any person who has an interest in the property may apply to the court to exclude their interest from the order.

(2) The court shall grant the application where the applicant is not the relevant person and the restraining order was made against the property under section 37 for the purpose of securing a pecuniary penalty order if it is satisfied that —

- (a) a pecuniary penalty order cannot be made against the relevant person; or
- (b) the relevant person does not have an interest in the property which is the subject of the application.

(3) The court shall grant the application where the applicant is not a relevant person and the restraining order was made against the property under section 37 for the purpose of securing a forfeiture order if it is satisfied that —

- (a) the property is not proceeds or an instrument in relation to the offence;
- (b) the applicant was not, in any way, involved in the commission of the offence;
- (c) where the applicant acquired the interest at the time of, or after the commission or alleged commission of, the confiscation offence, and the interest was acquired without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was proceeds or an instrument; and
- (d) the relevant person does not have an interest in the property which is the subject of the application.

(4) The court shall grant the application where the applicant is not a relevant person and the restraining order was made against the property under section 38 for the purpose of securing an automatic forfeiture order if it is satisfied that the relevant person does not have an interest in property the subject of the application.

(5) The court shall grant the application where the applicant is not the relevant person and the restraining order was made against the property under section 39 for the purpose of securing a civil penalty order if it is satisfied that —

- (a) a civil penalty order cannot be made against the relevant person; or
- (b) the relevant person does not have an interest in the property which is the subject of the application.

(6) The court shall grant the application where the applicant is not a relevant person and the restraining order was made against the property under section 39 for the purpose of securing a civil forfeiture order if it is satisfied that —

- (a) the property is not proceeds or an instrument in relation to the serious crime related activity or foreign serious crime related activity;
- (b) the applicant was not, in any way, involved in the commission of the serious crime related activity or foreign serious crime related activity;
- (c) where the applicant acquired the interest at the time of, or after the commission or alleged commission of, the serious crime related activity or foreign serious crime related activity, the interest was acquired without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was a proceed or an instrument; and
- (d) the relevant person does not have an interest in the property which is the subject of the application.

(7) The court shall grant the application where the applicant is the relevant person and the restraining order was made against the property under section 37 or 39 for the purpose of securing a pecuniary penalty order or a civil penalty order if it is satisfied that a pecuniary penalty order or a civil penalty order cannot be made against the relevant person.

(8) The court shall grant the application where the applicant is the relevant person and the restraining order was made against the property under section 37 or 39 for the purpose of securing a forfeiture order or a civil forfeiture order if it is satisfied that the property is not a proceed or an instrument.

(9) Subject to section 45 (1), the court shall grant the application where the applicant is the relevant person and the restraining order was made against the property under section 38 for the purpose of securing automatic forfeiture if it is satisfied that —

- (a) the property was not used in, or in connection with, any unlawful activity;
- (b) the property was not derived, directly or indirectly, by any person from any unlawful activity; and
- (c) the applicant's interest in the property was lawfully acquired.

(10) Where, prior to the occurrence of automatic forfeiture under section 22, an application is made for orders under subsections (4) or (9) or for a declaration under section 45 (1), the filing of the application shall suspend the expiration of the 60 day time period referred to in subsection 22 (1) in respect of any property specified in the application.

(11) In the event that any application for orders under subsections (6) or (9) or a declaration under section 45 (1) is dismissed, withdrawn or struck out the 60 day time period referred to in subsection 22 (1) shall be deemed, by operation of this subsection, to have expired thereby permitting automatic forfeiture under section 22 to occur.

Declaration to
suspend
automatic
forfeiture

45. (1) Where —

- (a) an application is made under section 44 (8),
- (b) the court is satisfied of the matters set out in section 44 (9) (a), (b) and (c) in respect of property the subject of the application; and
- (c) the property referred to in paragraph (b) is also subject to restraint pursuant to orders made under this Chapter to secure other forms of confiscation, the court shall not grant the application, but it may make a declaration that the specified property in respect of which it is satisfied under section 44 (7) be excluded from the operation of Part V of Chapter II.

(2) Where, prior to the operation of section 22, a declaration is made under subsection (1) in relation to property, automatic forfeiture of that property under section 22 shall not occur.

Establishment
of office of
Receiver

46. (1) There is hereby established an Office of Receiver which shall consist of a Receiver and such other officers as may be appointed.

(2) The office of Receiver shall be a public office, and accordingly, the provisions of the Public Service Act shall apply to the office of Receiver.

(3) The Minister may appoint a Receiver on such terms and conditions as he or she thinks fit.

(4) The Receiver shall be responsible for preserving the value of the property in his or her possession in respect of an order made under this Act or under any written law.

(5) Where the Receiver is directed to take control of property under sections 35 (3) or 43 (1), the Receiver may do anything that is reasonably necessary for the purpose of preserving the value of the property including —

- (a) becoming a party to any civil proceedings affecting the property;
- (b) maintenance of the property to preserve its value;
- (c) ensuring that the property is insured;
- (d) realising or otherwise dealing with securities or investments, if the property consists, wholly or partly, of securities or investments;
- (e) if the property consists of shares in a company, the Receiver may exercise the rights attaching to the shares as if he or she were the registered holder of the shares to the exclusion of the registered holder;
- (f) employing, or terminating the employment of persons in the business and doing any other thing that is necessary or convenient for carrying on the business on a sound commercial basis, if the property consists, wholly or partly, of a business; and

(g) if the property is volatile or wasting in nature or there is likely to be a significant depreciation in its value between the appointment of the Receiver and the date at which any proceedings under Chapters II and IV, in the opinion of the Receiver, likely to be concluded, sell the property by any means reasonably calculated to derive the best price and shall prudently invest the proceeds in an interest bearing account.

(6) Subsection (5) (c) and (d) shall not limit the generality of the other.

(7) Any person having possession of any property in respect of which a receiving order is made under this Act, shall give control or possession thereof to the Receiver.

(8) The Receiver shall, where practicable, give notice to an owner of any property he or she receives under this Act before he or she disposes of the property in any manner.

Chapter V – *Offences*

47. (1) A person who —

- (a) engages in a transaction that involves property which is, or in part directly or indirectly represents the proceeds of any crime; or
- (b) receives, is in possession of, conceals, disguises, transfers, converts, disposes of, removes from or brings into Botswana any property which, in whole or in part directly or indirectly represents, the proceeds of any crime, where he or she knows, suspects or has reasonable grounds for knowing or suspecting that the property is derived or realised, in whole or in part, directly or indirectly from any confiscation offence or foreign serious crime related activity, shall be guilty of the offence of money laundering.

Money
laundering
offence

(2) It shall be a defence to a charge under this section that the accused —

- (a) made a report in accordance with Part V of the Financial Intelligence Act in respect of the transaction that is the subject matter of the charge; or
- (b) dealt with the property which is the subject of the charge in order to assist in the enforcement of the law.

(3) A person convicted of an offence under this section shall be liable to a fine not exceeding P20 000 000, or to imprisonment for a term not exceeding 20 years, or to both.

48. (1) The court may —

- (a) convict a person of the offence of money laundering notwithstanding the absence of a conviction in respect of the crime alleged to have generated the proceeds that have been laundered;
- (b) upon single information or upon a separate information, convict a person of both money laundering and of the offence alleged to have generated the proceeds that have been laundered; or
- (c) reasonably infer that the proceeds were, in whole or in part, the proceeds of a crime, without specifying any particular crime.

Procedure
at trial

49. (1) Any person who, within Botswana or elsewhere —

- (a) receives or retains any property derived, directly or indirectly, from a pattern of racketeering activity;
- (b) knows or ought reasonably to have known that that property is so derived; and
- (c) uses or invests, directly or indirectly, any part of that property in the acquisition of any interest in, or the establishment or operation or activities of, any enterprise,

Proceeds from
racketeering

commits an offence.

(2) Any person who, within Botswana or elsewhere —

- (a) receives or retains any property, directly or indirectly, on behalf of any enterprise; and
- (b) knows or ought reasonably to have known that that property derived or is derived from or through a pattern of racketeering activity, commits an offence.

- (3) Any person who, within Botswana or elsewhere —
- (a) uses or invests any property, directly or indirectly, on behalf of any enterprise or in the acquisition of any interest in, or the establishment or operation or activities of any enterprise; and
 - (b) knows or ought reasonably to have known that that property derived or is derived from or through a pattern of racketeering activity, commits an offence.

(4) Any person who, within Botswana or elsewhere, acquires or maintains, directly or indirectly, any interest in or control of any enterprise through a pattern of racketeering activity commits an offence.

(5) Any person who, whilst managing or employed by or associated with any enterprise, within Botswana or elsewhere, conducts or participates in the conduct, directly or indirectly, of that enterprise's affairs through a pattern of racketeering activity commits an offence.

(6) Any person who, within Botswana or elsewhere, manages the operation or activities of an enterprise and who knows or ought reasonably to have known that any person, whilst employed by or associated with that enterprise, conducts or participates in the conduct, directly or indirectly, of that enterprise's affairs through a pattern of racketeering activity commits an offence.

(7) Any person who, within Botswana or elsewhere, conspires or attempts to contravene subsections (1) to (6) commits an offence.

(8) The court may hear evidence, including evidence with regard to hearsay, similar facts or previous convictions, relating to offences contemplated in subsections (1) to (7) notwithstanding that that evidence might otherwise be inadmissible, provided that the evidence would not render a trial unfair.

(9) For the purposes of proving a previous conviction during a trial in respect of an offence contemplated in subsections (1) to (7) it is sufficient to prove the original record of judicial proceedings if a copy of that record, certified or purporting to be certified as a true copy —

- (a) by the registrar or clerk of the court or other staff member having the custody of the record of those judicial proceedings; or
- (b) in the case where judicial proceedings are taken down in short hand or by mechanical means, by the person who transcribed those proceedings, is produced in evidence at the trial, and that copy is *prima facie* proof that any matter purporting to be recorded therein was correctly recorded.

Penalties

50. Any person convicted of an offence under section 49 is liable to a fine not exceeding P20 000 000, or to imprisonment for a term not exceeding 20 years, or to both.

Chapter VI – *Investigation Powers*Part I – *Production Orders*

51. (1) Where a person is the subject of an investigation for a confiscation offence or is reasonably suspected of having committed a foreign serious crime related activity, and there are reasonable grounds for suspecting that information relevant to the offence or activity, or that may assist in any way in tracking or identifying the proceeds of the offence, or in assessing the value of those proceeds, or in tracking, identifying or assessing the value of any property of the person convicted of the offence, or suspected of having committed the offence, are in possession of or under the control of any person, the Director of Public Prosecutions may apply to a magistrate's court for a production order in respect of any document containing the information relevant to the offence or activity.

Production
order

(2) An application for a production order shall be supported by an affidavit sworn by a prescribed investigator setting out the grounds for the application, and the basis for any suspicions as to the commission of the offence, or as to the location of any such information as is referred to in subsection (1).

(3) A magistrate before whom an application is made under this section, may, if he or she is satisfied that there are reasonable grounds for making the order, issue a production order, subject to such conditions as he or she may think fit to impose, ordering any person to produce to a police officer any documents of the kind referred to in subsection (1) that are in such person's possession or under his or her control, or to make such documents available to a prescribed investigator for inspection, at such time or place as may be specified in the order.

(4) Where a document is produced or made available to a prescribed investigator under this section he or she may take extracts from it or make copies of it, and if it was ordered to be produced to the prescribed investigator, he or she may retain it if, and for so long as, its retention is reasonably necessary for the purposes of this Act.

(5) A person shall not be excused from producing or making available a document when ordered to do so under this section on the ground that producing it or making it available might tend to incriminate him or her or make the person liable to a penalty, or that it would or might be in breach of an obligation (whether imposed by an enactment or otherwise) of the person not to disclose the existence or contents of the document:

Provided that any information, document or thing obtained as a direct or indirect consequence of the production or making available of the document shall not be admissible in evidence against the person producing it or making it available in any criminal proceedings except in respect of an offence under section 53.

(6) For the purposes of the proviso to subsection (5) proceedings on an application for a confiscation order or a restraining order are not criminal proceedings.

(7) Where a prescribed investigator retains a document pursuant to an order under this section, he or she shall, on request of the person to whom the order is addressed, give to that person a copy of the document, certified under his or her hand to be a true copy of the document.

(8) Where a production order requires a person to produce a document to a prescribed investigator, the person may apply to a magistrate's court or the High Court for a variation of the order, and if the court is satisfied that the document is essential to the business activities of the person, and the interests of justice will not thereby be jeopardised, it may vary the terms of the production order so that it requires the person to make the document available to a prescribed investigator for inspection.

Failure to
comply with
production
order

52. Where a person is required in accordance with the terms of a production order to produce a document to a prescribed investigator or to make a document available to a prescribed investigator officer for inspection, and contravenes the order without reasonable excuse, or in purported compliance with the order produces or makes available a document which he or she knows or has good reason to know is false or misleading in a material particular without disclosing that the document is so false or misleading, and without providing correct information, if he or she possesses or can reasonably acquire such correct information, commits an offence and shall be liable to a fine not exceeding P20 000 000, or to imprisonment for a term not exceeding 20 years or to both.

Part II — Monitoring Orders

Application for
monitoring
order

53. (1) A prescribed investigator may make an application *Ex parte*, to a magistrate's court or to the High Court for an order directing a specified party to provide information about any transaction conducted through an account held by a person with the specified party.

(2) An application under subsection (1) shall be supported by an affidavit of the applicant setting out the following —

(a) that he or she believes that the person in respect of whose account the information is sought —

(i) has committed, or is about to commit, a confiscation offence,

(ii) was involved in the commission, or is about to be involved in the commission, of such an offence, or

(iii) has benefited directly or indirectly, or is about to benefit directly or indirectly, from the commission of such an offence; and

(b) setting out the grounds on which the applicant holds those beliefs.

(3) A magistrate's court or the High Court may require the applicant to give any additional information that it requires concerning the grounds on which the order is sought.

(4) An application under subsection (1) shall be heard in closed court.

(5) An application under subsection (1) may be made with the assistance of the Directorate of Public Prosecutions.

54. (1) A magistrate's court or the High Court may, on an application under section 53 (1), if it considers that, having regard to the matters contained in the affidavit of the applicant and to any other sworn evidence before it, there are reasonable grounds for doing so, grant a monitoring order directed to the specified party.

Monitoring orders

(2) A monitoring order shall specify —

- (a) the name or names in which the account is believed to be held;
- (b) the kind of information that the specified party is required to give;
- (c) the law enforcement agency to which the information is to be given;
- (d) the manner in which the information is to be given; and
- (e) the period during which the order is to have effect.

(3) A period specified under subsection (2) (e) shall not commence earlier than the day on which notice of the order is given to the financial institution and shall not end later than 3 months after the date of the order.

(4) If a specified party is, or has been, subject to a monitoring order, the fact that the monitoring order has been granted shall be disregarded for the purposes of the application of section 47 in relation to the specified party.

(5) When a monitoring order has been granted the applicant shall give written notice of its making to the specified party to whom it is directed.

55. (1) A specified party that has been given notice of a monitoring order shall not knowingly —

Failure to comply with monitoring order

- (a) contravene the order; or
- (b) give, in purported compliance with the order, information that is false or misleading in a material particular.

(2) A specified party who contravenes subsection (1) commits an offence and shall be liable to a fine not exceeding P20 000 000, or imprisonment to a term not exceeding 20 years, or to both.

56. (1) A specified party that is, or has been, subject to a monitoring order shall not disclose the existence or operation of the order to any person, including the person to whom the order relates except —

Existence and operation of monitoring order not to be disclosed

- (a) if the order specifies the Botswana Police as the law enforcement agency to which information is to be given, to a police officer;
- (b) if the order specifies another authority as the law enforcement agency to which information is to be given, to a member, or member of staff of that agency;
- (c) an officer or agent of the specified party, for the purpose of ensuring that the order is complied with; or
- (d) a legal practitioner acting for the specified party, for the purpose of obtaining legal advice or representation in relation to the order.

(2) A specified party who contravenes subsection (1) commits an offence and shall be liable to a fine not exceeding P20 000 000, or to imprisonment to a term not exceeding 20 years, or to both.

(3) A person to whom the existence or operation of a monitoring order is disclosed in accordance with subsection (1) shall not —

- (a) while he or she is a person of a kind referred to in subsection (1) (a), (b), (c) or (d), disclose the existence or operation of the order to any other person except another person of that kind for —
 - (i) the performance of his or her duties; if the disclosure is made by a person of a kind referred to in subsection (1) (a) or (b),
 - (ii) ensuring that the order is complied with or obtaining legal advice or representation in relation to the order, if the disclosure is made by an officer or agent of the specified party, or
 - (iii) giving legal advice or providing representation in relation to the order, if the disclosure is made by a legal practitioner; or
- (b) when he or she is no longer a person of a kind referred to in subsection (1), make a record of, or disclose, the existence or operation of the order in any circumstances.

(4) Nothing in subsection (3) shall prevent the disclosure by a person of a kind referred to in subsection.

(1) of the existence or operation of a monitoring order —

- (a) for the purposes of, or in connection with legal proceedings; or
- (b) in the course of proceedings before a court.

(5) A person of a kind referred to in subsection (1) who contravenes subsection (3) commits an offence and shall be liable to a fine not exceeding P20 000 000, or to imprisonment to a term not exceeding 20 years, or to both.

(6) A reference in this section to the disclosure of the existence or operation of a monitoring order to a person includes a reference to disclosing information from which a person could reasonably be expected to infer the existence or operation of the monitoring order.

Part III — *Information notices*

Information
notices

57. (1) In this Part “account” means any facility or arrangement through which a specified party accepts deposits including fixed term deposits, allows withdrawals, rent outs safety deposit boxes, enter into a fiduciary relationship or any other business relationship.

(2) Information notices may be issued to —

- (a) a specified party listed under the First Schedule to the Financial Intelligence Act; and
- (b) such other specified party or persons as may be prescribed.

(3) A party referred to in subsection (2) shall be referred to as an information notice recipient for purposes of this Part.

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58. (1) An information notice may be issued in accordance with this Part by a prescribed investigator who —

- (a) where he or she is a member of the Botswana Police, has been authorised by the Commissioner of Police to issue such notices; or
- (b) where he or she is a customs officer, has been authorised by the Director of Customs to issue such notices; or
- (c) where he or she is a person authorised to conduct an enquiry or investigation under section 7 of the Corruption and Economic Crime Act, has been authorised by the Director of the Directorate on Corruption and Economic Crime to issue such notices.

(2) A prescribed investigator who has been authorised to issue an information notice in accordance with subsection (1) shall be referred to as an authorised prescribed investigator for purposes of this Part.

59. (1) An authorised prescribed investigator may issue an information notice to an information notice recipient for the purposes of any proceedings taken or being considered under this Act.

(2) An authorised prescribed investigator shall not issue an information notice unless he or she reasonably believes that the person in respect of whose account with the financial institution the information is sought or a person who has an interest in that account —

- (a) has committed, or is about to commit, a confiscation offence;
- (b) was involved in the commission, or is about to be involved in the commission, of such an offence; or
- (c) has benefited directly or indirectly, or is about to benefit directly or indirectly, from the commission of such an offence.

60. (1) An authorised prescribed investigator who issues an information notice shall make a written record of the reasons he or she relied on to justify the issuing of the information notice.

(2) An authorised prescribed investigator who issues an information notice shall sign the notice.

61. (1) An information notice may require an information notice recipient to give the following information —

- (a) if the information notice specifies a name or names in which an account is believed to be held —
 - (i) whether an account is held in that name or those names with the information notice recipient; and
 - (ii) if an account is held in that name or those names with that information notice recipient, the account number and current balance of that account; or
- (b) if the information notice specifies an account number —
 - (i) the name or names in which that account is held; and
 - (ii) the balance of that account.

(2) An information notice may only require an information notice recipient to give information to the law enforcement agency of which the person who issued the information notice is a member, an officer or an employee.

Persons
authorised
to issue
information
notices

Issuance of
information
notices

Information
notice to be
signed and
reasons
recorded

Information
required
in an
information
notice

Form of information notice

- 62.** (1) An information notice shall be in the prescribed form.
- (2) An information notice shall specify —
- (a) the name of the authorised prescribed investigator who issued the information notice;
 - (b) the section of this Act under which that person is authorised to issue information notices;
 - (c) the name of the information notice recipient;
 - (d) the name or names in which the account is believed to be held or the account number of the account believed to be held with the information notice recipient, as the case requires;
 - (e) any other details that may assist the information notice recipient to identify the account;
 - (f) the kind of information that the information notice recipient is required to give;
 - (g) the law enforcement agency to which the information is to be given, being the law enforcement agency of which the authorised prescribed investigator who issued the information notice is a member, an officer or an employee;
 - (h) that the information required is to be given in writing;
 - (i) the period within which the financial institution is to comply with the information notice, being a period of not less than 3 business days after the date on which the information notice is given to the financial institution; and
 - (j) the effect of sections 63 and 64.

Mode of giving an information notice

63. An information notice shall be given in accordance with section 59 and, without limiting the generality of that section, may be given by hand.

Failure to comply with information notice

- 64.** A specified party that has been given an information notice shall not —
- (a) without reasonable excuse, fail to comply with the information notice; or
 - (b) in purported compliance with the information notice, knowingly give information that is false or misleading in a material particular.

Disclosure of existence of information notice

- 65.** (1) Subject to subsection (7), a specified party that is given, or has been given, an information notice shall not disclose the existence of the information notice to any person, including the person to whom the notice relates, except —
- (a) where the information notice specifies the Botswana Police as the law enforcement agency to which the information is to be given, a member of Botswana Police;
 - (b) where the information notice specifies another authority or person as the law enforcement agency to which information is to be given, a member, an officer or an employee of that agency;
 - (c) an officer or agent of the specified party, for the purpose of ensuring that the information notice is complied with; or
 - (d) a legal practitioner acting for the specified party, for the purpose of obtaining legal advice or representation in relation to the information notice.

(2) Subject to subsection (6), a person to whom the existence of an information notice is disclosed in accordance with subsection (1) shall not —

- (a) while he or she is a person of a kind referred to in subsection (1) (a), (b), (c) or (d), disclose the existence of the information notice to any person except another person of that kind for —
 - (i) the performance of his or her duties; if the disclosure is made by a person of a kind referred to in subsection (1) (a) or (b),
 - (ii) ensuring that the information notice is complied with or obtaining legal advice or representation in relation to the information notice, if the disclosure is made by an officer or agent of the specified party, or
 - (iii) giving legal advice or providing representation in relation to the information notice, if the disclosure is made by a legal practitioner; or
- (b) when he or she is no longer a person of a kind referred to in subsection (1), make a record of, or disclose, the existence or operation of the information notice in any circumstances.

(3) Nothing in subsection (2) shall prevent the disclosure by a person of a kind referred to in subsection (1) of the existence or operation of an information notice —

- (a) for the purposes of, or in connection with legal proceedings;
- (b) in the course of proceedings before a court; and
- (c) for the purpose of preparing a report.

(4) A person of a kind referred to in subsection (1) who contravenes subsection (2) commits an offence and shall be liable to a fine not exceeding P20 000.00 or to imprisonment to a term not exceeding 20 years, or to both.

(5) A reference in this section to the disclosure of the existence or operation of an information notice to a person includes a reference to disclosing information from which a person could reasonably be expected to infer the existence or operation of an information notice.

(6) It shall not be an offence under this section to disclose the existence of an information notice if the existence of the information notice has been made known in any proceedings in open court.

66. No civil proceedings may lie against —

- (a) a specified party; or
- (b) a person who is an officer, employee or agent of a specified party acting in the course of the person's duties as an officer, employee or agent, in relation to any action taken or information given by the specified party or person in compliance with a production order, monitoring order or information notice.

Immunity
from suit

Part IV — *Search warrants*Powers of
search, etc.

67. (1) Where a person has been convicted of a serious offence, or there are reasonable grounds for suspecting that a person has committed a serious offence, and there are reasonable grounds for suspecting that there is on any land, or upon any premises, any information such as is described under section 51 (1) in relation to the offence, the Director of Public Prosecutions may apply to any court for a search warrant in respect of that land or those premises.

(2) A police officer of or above the rank of Inspector may, under the authority of a search warrant issued under subsection (1), enter upon any land or into any premises specified in the warrant, to search for and seize any thing or document which he or she believes on reasonable grounds to contain information such as is described under section 51 (1).

(3) A magistrate or judge shall not issue a search warrant under this section unless he or she is satisfied that —

- (a) the document involved cannot be identified or described with sufficient particularity for the purpose of obtaining a production order in respect of it;
- (b) a production order has been given in respect of the document and has not been complied with;
- (c) a production order in respect of the document would be unlikely to be effective because there are reasonable grounds to suspect that it would not be complied with; or
- (d) the investigation for the purposes of which the search warrant is sought might be seriously prejudiced if immediate access to the document is not obtained without prior notice to any person.

Chapter VII — *Confiscated Assets Trust Fund*Establishment
of Fund

68. (1) The Minister shall establish a Fund to be known as the Confiscated Assets Trust Fund to which all moneys collected under this Act shall be paid into.

(2) In addition to any moneys which may be collected under this Act, any profits derived or investments and sales made by the Receiver in relation to property confiscated under this Act shall be paid into the Fund.

Chapter VIII — *Miscellaneous*

69. (1) Proceedings on an application under this Act are civil in nature, except as otherwise provided by this Act.

Nature of proceedings

(2) The fact that criminal proceedings have been instituted or have commenced shall not be a ground for the court to stay civil proceedings under this Act.

70. (1) When a court is sentencing an offender in respect of an offence where proceedings for the confiscation of property were made under Chapter II Part II or III of this Act it shall —

Confiscation and sentencing

(a) have regard to the following —

- (i) a forfeiture order made under Chapter II Part IV or Part VI or forfeiture under Chapter III in respect to property that was used in or in connection with the commission of the offence or that was intended to be used in or in connection with the commission of the offence or that was derived or realised, or substantially derived or realised from such property,
- (ii) the forfeiture of property by operation of Chapter II Part V, provided that it is satisfied that the property was lawfully acquired, or
- (iii) the imposition of a pecuniary penalty order under Chapter II Part I or a civil penalty order under Chapter II Part II to the extent to which it relates to benefits in excess of profits derived from the commission of the offence;

(b) not have regard to any forfeiture order made under Chapter II Part IV or Part VI or to forfeiture under Chapter III in respect of property that was derived or realised or substantially derived or realised, directly or indirectly, by any person as the result of the commission of the offence;

(c) not have regard to any pecuniary penalty order made under Chapter II Part I or civil penalty order made under Chapter II Part II to the extent to which it relates to profits, as opposed to benefits, derived from the commission of the offence;

(d) subject to paragraph (a) (ii), not have regard to any property forfeited under Chapter II Part V; or

(e) not have regard to any pecuniary penalty order made under Chapter II Part I or civil penalty order made under Chapter II Part II where section 17 was applied to the assessment of benefits derived from a serious offence or a serious crime related activity.

(2) Where it is not possible to take matters referred to in subsection (1) into account at the time of sentencing due to the fact that confiscation proceedings have not been concluded as at the date sentence is imposed and it is not practicable or in the interests of justice to defer sentence until the confiscation proceedings have been determined, the offender may apply to the court which imposed the sentence for a reconsideration of the sentence having regard to the matters referred to in subsection (1).

(3) A court to which an application under subsection (2) is made shall —

- (a) dismiss the application; or
- (b) if it is satisfied that it would have imposed a lesser sentence on the offender if matters referred to in subsection (1) were able to be taken into consideration at the time of sentencing, substitute a lesser sentence for the sentence actually given and credit towards that sentence any penalty imposed and served or paid under the original sentence.

(4) The common law position of *functus officio* which prevents the re-opening of a matter before the same court which rendered a final decision shall not apply to an application made under subsection (2)

Costs

71. (1) Costs may only be awarded in accordance with this section.

(2) If —

- (a) a person brings, or appears at, proceedings under this Act before a court in order —
 - (i) to prevent an order being made under Chapters II, III or IV against property of the person, or
 - (ii) to have property of the person excluded from a restraining order made under Chapter IV;

(b) the person is successful in those proceedings; or

(c) the court is satisfied that the person was not involved in any way in the commission of the offence or serious crime related activity in respect of which the order under Chapters II, III or IV was sought or made, the court may order the applicant to pay all costs incurred by the person in connection with the proceedings or any part of those costs that is determined by the court.

(3) Where the court is satisfied that a person was not involved in the commission of the offence or serious crime related activity in respect of which an order under Chapters II, III or IV was sought or made, it may make an order that the applicant pay all costs incurred by the person in connection with the proceedings or any part of those costs if it is satisfied that the order was sought in bad faith by the applicant.

Regulations

72. (1) The Minister may make regulations prescribing anything under this Act which is to be prescribed or which is necessary or convenient to be prescribed for the better carrying out of the objects and purposes of this Act, or to give force and effect to its provisions.

(2) Without prejudice to the generality of subsection (1), regulations may provide for —

- (a) any issues relating to the administration of the Fund; and
- (b) anything in this Act which is to be or may be prescribed.

73. (1) Without affecting any other right of appeal a person against whom a pecuniary penalty order is made pursuant to section 4 may appeal against that order in the same manner as if it were, or were part of, the sentence imposed in respect of the offence in relation to which the order was made.

(2) Without affecting any other right of appeal a person who has an interest in property in respect of which the High Court has made or refused to make an exclusion order under section 44 (2) may appeal against that order or refusal in the same manner as if the person had been convicted of the offence in reliance on which the order was made and the order was, or was part of, the sentence imposed in respect of the offence.

(3) Without affecting any other right of appeal a person who has an interest in property, restrained for the purpose of a pecuniary penalty order, in respect of which the High Court has made or refused to make an exclusion order under section 44 (7) may appeal against that order or refusal in the same manner as if the order was, or was part of, the sentence imposed in respect of the offence.

(4) Without affecting any other right of appeal a person against whom a civil penalty order is made may appeal against that order or refusal in the same manner as if the person had been convicted of an offence equivalent to the serious crime related activity or foreign serious crime related activity in relation to which the order was made and the order was, or was part of, the sentence imposed in respect of the offence.

(5) Without affecting any other right of appeal a person who has an interest in property in respect of which the High Court has made or refused to make an exclusion order under section 44 (4) may appeal against that order or refusal in the same manner as if the person had been convicted of the offence in reliance on which the order was made and the order was, or was part of, the sentence imposed in respect of the offence.

(6) Without affecting any other right of appeal a person who has an interest in property, restrained for the purpose of a civil penalty order, in respect of which the High Court has made or refused to make an exclusion order under section 44 (7) may appeal against that order or refusal in the same manner as if the person had been convicted of the offence in reliance on which the order was made and the order was, or was part of, the sentence imposed in respect of the offence.

(7) Without affecting any other right of appeal a person who has an interest in property in respect of which —

- (a) a forfeiture order is made pursuant to section 19; or
- (b) the High Court has made, or refused to make an exclusion order under section 44 (3) and (8) in respect of property restrained for the purpose of a forfeiture order, or section 44 (9),

may appeal against that order or refusal and in the case of a person convicted of an offence in reliance on which the order was made, in the same manner as if the order were, or were part of, the sentence imposed in respect of the offence or in any other case in the same manner as if the person has been convicted of the offence in reliance on which the order was made and the order were, or were part of, the sentence imposed in respect of the offence.

(8) Without affecting any other right of appeal a person who has an interest in property in respect of which —

- (a) a civil forfeiture order is made pursuant to section 27; or
- (b) the High Court has made, or refused to make an exclusion order under section 44 (5) or (8), in respect of property restrained for the purpose of a civil forfeiture order,

may appeal against that order or refusal in the same manner as if the person has been convicted of an offence equivalent to the serious crime related activity or foreign serious crime related activity in relation to which the order was made and the order were, or were part of, the sentence imposed in respect of the offence.

(9) The Director of Public Prosecutions or a prescribed person may appeal against —

- (a) a forfeiture order or against the refusal of a court to make a forfeiture order;
- (b) a civil forfeiture order or against the refusal of a court to make a civil forfeiture order;
- (c) the making of a pecuniary penalty order or against the refusal of a court to make a pecuniary penalty order; or
- (d) the making of a civil penalty order or against the refusal of a court to make a civil penalty order; or
- (e) the making of an exclusion order under section 44, in the same manner as if the order or refusal were, or were part of, a sentence imposed in respect of the offence.

(10) On appeal, a forfeiture order, civil forfeiture order, pecuniary penalty order, civil penalty order or exclusion order under section 44 or a refusal to make an exclusion order under section 44 may be confirmed, discharged or varied or the matter may be remitted for rehearing to the court which made the order, or refused to make the order, with or without any direction in law.

- 74.** (1) The Proceeds of Serious Crime Act is hereby repealed.
(2) Notwithstanding the repeal effected under subsection (1), this Act shall apply —

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- (a) with respect to serious offences within the meaning of the repealed Act for which criminal proceedings were commenced before the commencement of this Act, irrespective of whether any conviction of that offence for the purposes of the repealed Act occurs before or after the commencement of this Act;
- (b) to forfeiture offences for which criminal proceedings have commenced after the commencement of this Act, irrespective of when the offence to which the proceedings relate is alleged to have been committed; and
- (c) with respect to a serious crime related activity or foreign serious crime related activity for the purposes of Chapter II Parts II and VI and Chapter III that is alleged to have been committed after the commencement of this Act; and
- (d) with respect to any application, appeal, order, warrant or direction that has been made, given, issued or done under the repealed Act or is still pending.

75. Notwithstanding the repeal effected under section 74 —

- (a) anything made, given, issued or done under the repealed Act shall have the same effect as if it was made, given, issued or done under this Act;
- (b) any application made to a court under the repealed Act shall continue to be dealt with and determined as if it was made under this Act; and
- (c) any sum paid or realised towards the settlement of a confiscation order made under the repealed Act shall be paid into the Confiscated Assets Trust Fund as if it was a sum realised under this Act.

Savings and
transitional
provision

PASSED by the National Assembly this 15th day of July, 2014.

BARBARA N. DITHAPO,
Clerk of the National Assembly.

Chapter VIII — *Miscellaneous*

69. (1) Proceedings on an application under this Act are civil in nature, except as otherwise provided by this Act.

Nature of proceedings

(2) The fact that criminal proceedings have been instituted or have commenced shall not be a ground for the court to stay civil proceedings under this Act.

70. (1) When a court is sentencing an offender in respect of an offence where proceedings for the confiscation of property were made under Chapter II Part II or III of this Act it shall —

Confiscation and sentencing

(a) have regard to the following —

- (i) a forfeiture order made under Chapter II Part IV or Part VI or forfeiture under Chapter III in respect to property that was used in or in connection with the commission of the offence or that was intended to be used in or in connection with the commission of the offence or that was derived or realised, or substantially derived or realised from such property,
 - (ii) the forfeiture of property by operation of Chapter II Part V, provided that it is satisfied that the property was lawfully acquired, or
 - (iii) the imposition of a pecuniary penalty order under Chapter II Part I or a civil penalty order under Chapter II Part II to the extent to which it relates to benefits in excess of profits derived from the commission of the offence;
- (b) not have regard to any forfeiture order made under Chapter II Part IV or Part VI or to forfeiture under Chapter III in respect of property that was derived or realised or substantially derived or realised, directly or indirectly, by any person as the result of the commission of the offence;
- (c) not have regard to any pecuniary penalty order made under Chapter II Part I or civil penalty order made under Chapter II Part II to the extent to which it relates to profits, as opposed to benefits, derived from the commission of the offence;
- (d) subject to paragraph (a) (ii), not have regard to any property forfeited under Chapter II Part V; or
- (e) not have regard to any pecuniary penalty order made under Chapter II Part I or civil penalty order made under Chapter II Part II where section 17 was applied to the assessment of benefits derived from a serious offence or a serious crime related activity.

(2) Where it is not possible to take matters referred to in subsection (1) into account at the time of sentencing due to the fact that confiscation proceedings have not been concluded as at the date sentence is imposed and it is not practicable or in the interests of justice to defer sentence until the confiscation proceedings have been determined, the offender may apply to the court which imposed the sentence for a reconsideration of the sentence having regard to the matters referred to in subsection (1).

(3) A court to which an application under subsection (2) is made shall —

- (a) dismiss the application; or
- (b) if it is satisfied that it would have imposed a lesser sentence on the offender if matters referred to in subsection (1) were able to be taken into consideration at the time of sentencing, substitute a lesser sentence for the sentence actually given and credit towards that sentence any penalty imposed and served or paid under the original sentence.

(4) The common law position of *functus officio* which prevents the re-opening of a matter before the same court which rendered a final decision shall not apply to an application made under subsection (2)

Costs

71. (1) Costs may only be awarded in accordance with this section.

(2) If —

- (a) a person brings, or appears at, proceedings under this Act before a court in order —
 - (i) to prevent an order being made under Chapters II, III or IV against property of the person, or
 - (ii) to have property of the person excluded from a restraining order made under Chapter IV;

(b) the person is successful in those proceedings; or

(c) the court is satisfied that the person was not involved in any way in the commission of the offence or serious crime related activity in respect of which the order under Chapters II, III or IV was sought or made, the court may order the applicant to pay all costs incurred by the person in connection with the proceedings or any part of those costs that is determined by the court.

(3) Where the court is satisfied that a person was not involved in the commission of the offence or serious crime related activity in respect of which an order under Chapters II, III or IV was sought or made, it may make an order that the applicant pay all costs incurred by the person in connection with the proceedings or any part of those costs if it is satisfied that the order was sought in bad faith by the applicant.

Regulations

72. (1) The Minister may make regulations prescribing anything under this Act which is to be prescribed or which is necessary or convenient to be prescribed for the better carrying out of the objects and purposes of this Act, or to give force and effect to its provisions.

(2) Without prejudice to the generality of subsection (1), regulations may provide for —

- (a) any issues relating to the administration of the Fund; and
- (b) anything in this Act which is to be or may be prescribed.

73. (1) Without affecting any other right of appeal a person against whom a pecuniary penalty order is made pursuant to section 4 may appeal against that order in the same manner as if it were, or were part of, the sentence imposed in respect of the offence in relation to which the order was made.

(2) Without affecting any other right of appeal a person who has an interest in property in respect of which the High Court has made or refused to make an exclusion order under section 44 (2) may appeal against that order or refusal in the same manner as if the person had been convicted of the offence in reliance on which the order was made and the order was, or was part of, the sentence imposed in respect of the offence.

(3) Without affecting any other right of appeal a person who has an interest in property, restrained for the purpose of a pecuniary penalty order, in respect of which the High Court has made or refused to make an exclusion order under section 44 (7) may appeal against that order or refusal in the same manner as if the order was, or was part of, the sentence imposed in respect of the offence.

(4) Without affecting any other right of appeal a person against whom a civil penalty order is made may appeal against that order or refusal in the same manner as if the person had been convicted of an offence equivalent to the serious crime related activity or foreign serious crime related activity in relation to which the order was made and the order was, or was part of, the sentence imposed in respect of the offence.

(5) Without affecting any other right of appeal a person who has an interest in property in respect of which the High Court has made or refused to make an exclusion order under section 44 (4) may appeal against that order or refusal in the same manner as if the person had been convicted of the offence in reliance on which the order was made and the order was, or was part of, the sentence imposed in respect of the offence.

(6) Without affecting any other right of appeal a person who has an interest in property, restrained for the purpose of a civil penalty order, in respect of which the High Court has made or refused to make an exclusion order under section 44 (7) may appeal against that order or refusal in the same manner as if the person had been convicted of the offence in reliance on which the order was made and the order was, or was part of, the sentence imposed in respect of the offence.

(7) Without affecting any other right of appeal a person who has an interest in property in respect of which —

- (a) a forfeiture order is made pursuant to section 19; or
- (b) the High Court has made, or refused to make an exclusion order under section 44 (3) and (8) in respect of property restrained for the purpose of a forfeiture order, or section 44 (9),

may appeal against that order or refusal and in the case of a person convicted of an offence in reliance on which the order was made, in the same manner as if the order were, or were part of, the sentence imposed in respect of the offence or in any other case in the same manner as if the person has been convicted of the offence in reliance on which the order was made and the order were, or were part of, the sentence imposed in respect of the offence.

(8) Without affecting any other right of appeal a person who has an interest in property in respect of which —

- (a) a civil forfeiture order is made pursuant to section 27; or
- (b) the High Court has made, or refused to make an exclusion order under section 44 (5) or (8), in respect of property restrained for the purpose of a civil forfeiture order,

may appeal against that order or refusal in the same manner as if the person has been convicted of an offence equivalent to the serious crime related activity or foreign serious crime related activity in relation to which the order was made and the order were, or were part of, the sentence imposed in respect of the offence.

(9) The Director of Public Prosecutions or a prescribed person may appeal against —

- (a) a forfeiture order or against the refusal of a court to make a forfeiture order;
- (b) a civil forfeiture order or against the refusal of a court to make a civil forfeiture order;
- (c) the making of a pecuniary penalty order or against the refusal of a court to make a pecuniary penalty order; or
- (d) the making of a civil penalty order or against the refusal of a court to make a civil penalty order; or
- (e) the making of an exclusion order under section 44, in the same manner as if the order or refusal were, or were part of, a sentence imposed in respect of the offence.

(10) On appeal, a forfeiture order, civil forfeiture order, pecuniary penalty order, civil penalty order or exclusion order under section 44 or a refusal to make an exclusion order under section 44 may be confirmed, discharged or varied or the matter may be remitted for rehearing to the court which made the order, or refused to make the order, with or without any direction in law.

- 74.** (1) The Proceeds of Serious Crime Act is hereby repealed.
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- (a) with respect to serious offences within the meaning of the repealed Act for which criminal proceedings were commenced before the commencement of this Act, irrespective of whether any conviction of that offence for the purposes of the repealed Act occurs before or after the commencement of this Act;
 - (b) to forfeiture offences for which criminal proceedings have commenced after the commencement of this Act, irrespective of when the offence to which the proceedings relate is alleged to have been committed; and
 - (c) with respect to a serious crime related activity or foreign serious crime related activity for the purposes of Chapter II Parts II and VI and Chapter III that is alleged to have been committed after the commencement of this Act; and
 - (d) with respect to any application, appeal, order, warrant or direction that has been made, given, issued or done under the repealed Act or is still pending.

Repeal
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- (b) any application made to a court under the repealed Act shall continue to be dealt with and determined as if it was made under this Act; and
- (c) any sum paid or realised towards the settlement of a confiscation order made under the repealed Act shall be paid into the Confiscated Assets Trust Fund as if it was a sum realised under this Act.

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PASSED by the National Assembly this 15th day of July, 2014.

BARBARA N. DITHAPO,
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